No. 05-1671

Supreme Court, U.S
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In The
Supreme Court of the United States

CHARLES and LESA CANAS,
as Natural Guardians and Next Friends of
DEREK CANAS, and DEREK CANAS, Individually,

Petitioners,

v.

AYMAN AL-JABI, M.D.; SHARON J. KAMINER, M.D.;
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA
HOSPITALS AND CLINICS; and MCG HEALTH, INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Georgia

BOARD OF REGENTS' RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Georgia's medical malpractice statute of limitation at O.C.G.A. § 9-3-73(b), requiring that a minor who is under age 5 at the time of the injury, bring an action by his or her seventh birthday violates the guarantees of equal protection and due process under the Fourteenth Amendment?

2. Whether Georgia's medical malpractice statute of repose at O.C.G.A. § 9-3-73(c), requiring that a minor who is under age 5 at the time of the allegedly negligent act or omission, bring an action by his or her tenth birthday violates the guarantees of equal protection and due process under the Fourteenth Amendment?

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Appendix A – Constitutional and Statutory Provisions 1a

STATEMENT OF THE CASE

The Supreme Court of Georgia, which may decline to exercise its exclusive appellate jurisdiction over constitutional challenges to Georgia statutes, where the law is well-settled,[1] transferred this case and four cross-appeals (*i.e.*, one per Respondent-Defendant) to the Georgia Court of Appeals for resolution of both the federal and state constitutional issues and other state law issues. All five cases[2] have been fully briefed without oral argument and are awaiting decision by the Georgia Court of Appeals on all these issues. Petitioners (Plaintiffs in the trial court below) have argued on brief that the Court of Appeals of Georgia could find that the Georgia medical malpractice statutes of limitation and repose at O.C.G.A. §§ 9-3-73(b) and 9-3-73(c) do not bar their claims.

The trial court's first order on September 19, 2005, does not address the constitutional issues because they were not raised at the hearing on September 13, 2005. After all Respondents (Defendants in the trial court) had petitioned the Georgia Court of Appeals via O.C.G.A. § 5-6-34(b) for an interlocutory review of the state law issues,[3]

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[1] *Pollard v. State*, 229 Ga., 698 (1972). *Braden v. Bell*, 222 Ga. App. 144, 146 (1996).

[2] The pending main appeal is *Canas v. Al-Jabi et al.*, Georgia Court of Appeals, Case No. A06A1337. The pending four cross-appeals are: *Kaminer v. Canas*, Case No. A06A1338, *Al-Jabi v. Canas*, Case No. A06A1339, *Board of Regents v. Canas*, Case No. A06A1340, and *MCG Health Inc. v. Canas*, Case No. A06A1341.

[3] Interlocutory review under O.C.G.A. § 5-6-34(b) was sought because the trial judge's order granted Respondent-Defendants only partial summary judgment on the statutes of limitation and repose and left the case pending for trial about injuries and damages occurring two years before the complaint and negligent acts or omissions occurring five years before the complaint.

then on Friday, October 14, 2005, Petitioners presented the trial judge another order ruling *in Respondents' favor* that the Georgia medical malpractice statutes of limitation and repose did *not* violate the state or federal constitutional guarantees of equal protection or due process.[4] This second order, which the trial judge signed on Monday, October 17, 2005, was carefully worded so as not to misstate the fact that neither the trial judge nor any of the attorneys raised the constitutional challenges at the hearing.[5] Respondent did not oppose the second Order, since it believed it to be an accurate statement of the law. Petitioners then took a direct appeal from this second Order to the Supreme Court of Georgia[6] on the constitutional issues. All Respondents-Defendants filed cross-appeals there on the other state law issues. The four petitions for interlocutory review in the Georgia Court of Appeals were dismissed as moot but the Supreme Court of

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[4] Georgia's procedure at § 5-6-34(b) for requesting interlocutory review of an order, which does not finally dispose of the case in the trial court, does not deprive the trial judges of jurisdiction until the appellate court grants the request for interlocutory review and a notice of appeal is filed.

[5] The Order of October 17, 2005 reads: "This [constitutional] issue has been raised by Plaintiffs in opposition to defense motions for summary judgment." Some disinterested person reading the Order might conclude that the issue was discussed at the hearing on the motion. However, the specific language of the Order means that the issue was raised in one brief in opposition to one of the four Respondents'-Defendants' Motions at the trial level.

[6] The Georgia Civil Practice Act permits an appeal from a non-final judgment where summary judgment is granted to any party on any one issue. O.C.G.A. § 9-11-56(h). Respondents-Defendants could not utilize this vagary of Georgia procedure because the first Order granted only partial summary judgment on each issue.

Georgia then transferred all five appeals and cross-appeals to the Georgia Court of Appeals.

STATEMENT OF LACK OF JURISDICTION

Even though the Supreme Court of Georgia has virtually directed the Court of Appeals of Georgia to find that Georgia's medical malpractice statutes of limitation and repose do not violate the state or federal constitutional guarantees of equal protection, this Court does not have subject matter jurisdiction over this case under 28 U.S.C. § 1257(a). That section allows the Supreme Court of the United States to review final judgments of the highest courts of individual states about whether a state statute violates the federal constitution.

> Final judgments of decrees rendered by the highest courts of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of . . . a statute of any State is drawn in question on the grounds of it being repugnant to the Constitution . . . of the United States . . . or where any . . . right . . . is . . . claimed under the Constitution . . . of . . . the United States.

28 U.S.C. § 1257(a).

The pragmatic approach, adopted by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975), about subject matter jurisdiction under § 1257(a) does not allow review simply because a party has exhausted its right of appeal of a federal constitutional issue within the state courts. Such a condition is necessary but not determinative under *Cox Broadcasting Corp.* Rather review is

allowed only where the determination of the federal constitutional issue is necessary for practical purposes. Practically speaking, a decision whether or not the state statutes violate the federal constitution is not necessary under the facts of this case because, regardless of any decision on that federal issue, this personal injury case must still be decided on the basis of state law.

In *Cox Broadcasting*, this Court enumerated four separate categories of cases where a judgment, while not final in the strict sense, would be treated as such for practical purposes. Those four categories cover cases: (1) "in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained"; (2) in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings"; (3) "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case"; and (4) "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." This Court recently reiterated

those same categories in *Florida v. Thomas*, 532 U.S. 774, 777-780 (2001).[7]

Petitioners'-Plaintiffs' case here does not fall within any of these four enumerated exceptions corresponding to the numbers below. (1) Unlike *Mills v. Alabama*, 384 U.S. 214 (1966), where the only defense to a criminal conviction was the exercise of free speech under the First Amendment, the federal issue here will not conclude or preordain the outcome. Whether or not this Court finds that Georgia's medical malpractice statutes of limitation and repose violate the United States Constitution, the case still must be resolved on the basis of state law. If Plaintiffs-Petitioners were to prevail in this Court and the statutes were found invalid, then a trial would be required. If Plaintiffs-Petitioners do not prevail in this Court, then the Georgia Court of Appeals must still determine under state law whether (a) a new injury bars application of the statute of limitation and whether (b) fraud estops Defendants-Respondents from arguing the statute of repose.

(2) Unlike *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945),[8] the federal constitutional issue raised may never need to be decided. Plaintiffs-Petitioners could prevail in the Georgia Court of Appeals on the application of the medical malpractice statutes of limitation and repose to the facts of the case. If the Georgia Court of

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[7] *Florida v. Thomas*, 532 U.S. 774 (2001), involving review of a state court determination that the death penalty violated the federal constitution, fell into the third category.

[8] Whatever the outcome of the accounting ordered by the Nebraska Supreme Court, the federal issue regarding the transfer of the radio station would still have to be decided.

Appeals determines that these statutes do not bar the claim, then Plaintiffs-Petitioners can proceed to trial.

(3) Unlike *Florida v. Thomas, supra*, Petitioners-Plaintiffs are not precluded from pursuing the federal constitutional question later if the Georgia Court of Appeals decides that the statutes of limitation and repose completely barred their action. They can later petition this Court for certiorari after the Georgia appellate courts have finally ruled on their claim.

(4) Unlike *Cox Broadcasting*, if Plaintiffs-Petitioners were now successful on appeal to this Court and the Georgia statute were held to violate the Fourteenth Amendment, Defendants'-Respondents' dismissal will be precluded, and a trial will be provided in the Georgia court. *Cox Broadcasting* presents the exact opposite of the current situation because, there, if petitioners prevailed on the federal constitutional question, then future litigation in the state court would have been precluded.

Cox Broadcasting had published the name of a rape victim in violation of a Georgia statute, which the media claimed was an infringement of the right of free speech under the First Amendment. The Georgia Supreme Court found the statute constitutional and remanded the case for trial on a common law invasion of privacy claim by the rape victim's parent(s). This Court granted certiorari because, if the media prevailed on the constitutional question, there would be no need for a state court trial, even though the media might have ultimately prevailed during the jury trial.

By contrast, in the current case, if certiorari is granted and if Petitioners-Plaintiffs prevail on the federal

constitutional question and the Georgia medical malpractice statutes of limitation and repose are struck, then a trial in the state system will not be precluded but rather provided. Because a determination by this Court in Petitioners'-Plaintiffs' favor will not preclude future litigation (category 4), may not be needed at all (categories 1 and 2), and, if needed, can be made later (category 3), this Court does not now have subject matter jurisdiction under § 1257(a) and should dismiss the Petition for Certiorari.

STATEMENT OF FACTS

Petitioner Derek Canas was born on November 10, 1984. Respondent Board of Regents of the University System of Georgia ("Board of Regents") operated the Medical College of Georgia Hospitals and Clinics ("MCGH&C") and employed Sharon Kaminer, M.D. as part of its mission for medical education.[9] Petitioner received blood transfusions, allegedly contaminated by the human immunodeficiency virus ("HIV"), at MCGH&C during January and February, 1985, when no blood test was available for HIV. Such a test became available at MCGH&C on or about March 22, 1985, but Respondent did not recommend or provide such a test to Petitioner Derek Canas. Petitioner displayed persistent growth delay, characteristic of children with Acquired Immunodeficiency Syndrome ("AIDS"), at age one or two in 1985 or 1986. Respondent through its employees, including Dr. Kaminer, never told Petitioners that the growth delay was attributable to the congenital heart

[9] Co-respondent MCG Health, Inc. assumed operation of MCGH&C effective July 1, 2000.

defect, surgery for which had originally necessitated the blood transfusions. Petitioner Derek Canas was last examined at MCGH&C on February 15, 2001, and was first provided a diagnosis of AIDS in April, 2001. Petitioners brought this current lawsuit against Respondent on February 7, 2003. Whether this lawsuit was brought within two years of the injury and within five years of the negligent act or omission are questions to be decided during the pending appeal of this case before the Court of Appeals of Georgia. It is undisputed that suit was not filed by the time Petitioner Derek Canas reached his seventh birthday (*i.e.*, November 10, 1991) or his tenth birthday (*i.e.*, November 10, 1994).

SUMMARY OF ARGUMENT

In order to assure the availability of medical providers, stabilize medical malpractice insurance premiums, and limit malpractice exposure from old claims, Georgia's statutes of limitation and repose for medical malpractice actions abrogate the ordinary tolling provision for personal injury actions until majority and impose different requirements for minors of different age. Minors, who have reached age five, are subject to the same requirements as adults and must bring suit within two years of the injury (*i.e.*, period of limitation) and no more than five years after the negligent act or omission (*i.e.*, period of repose). O.C.G.A. §§ 9-3-71(a), 9-3-71(b), 9-3-73(b), 9-3-73(c)(2)(B). Minors, like Petitioner Derek Canas, under age five at the time of the injury must file suit by their seventh birthday. § 9-3-73(b). Minors under age five at the time of the negligent act or

omission must also file by their tenth birthday. § 9-3-73(c)(2)(A).[10]

Petitioners claim that these schedules unlawfully treat (1) minors with medical malpractice claims differently from minors with other personal injury claims and (2) persons with latent, undiscovered medical malpractice claims differently from persons with patent, discovered claims.[11] Petitioners urge this Court to review this case because of an alleged lack of uniformity among the decisions of the state supreme courts and then to apply stricter scrutiny than a rational basis in order to find a violation of the guarantees of equal protection under the laws and due process of law within the Fourteenth Amendment. Yet the vast weight of judicial authority utilizes a rational basis test and finds similar statutes constitutional. Also the alleged lack of uniformity among the states is almost entirely attributable to (a) differing state laws defining when medical malpractice claims arise and (b) varying understandings of equal protection and due process under state constitutions.

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[10] The only exception, not relevant here, arises where a foreign object is left in the body, and in those cases a claimant, regardless of age, or date of injury or of the act, also has one year from the discovery of the foreign object to file suit. § 9-3-72.

[11] Petitioners claimed below that the two-tiered statutes violated equal protection because a newborn, injured at birth, had a ten-year statute of repose and a seven-year statute of limitation but a minor, injured by malpractice just after his fifth birthday, had a five-year statute of repose and a two-year statute of limitation. Plaintiffs have dropped this argument because they benefited from this arrangement. Because the injury alleged in this case (*i.e.*, AIDS) developed and the malpractice alleged in this case (*i.e.*, not testing for HIV) occurred within the first few months of life, Petitioner had a longer period of tolling than most minor claimants.

REASONS FOR DENYING WRIT

Consistent with the authority of this Court, the overwhelming majority of federal and state courts reviewing state statutes, applied only to medical malpractice claims and designed to limit malpractice exposure, have used a rational basis test and found no violation of due process or equal protection under the Fourteenth Amendment. *Gronne v. Abrams*, 793 F.2d 74, 77 (2nd Cir. 1986) (non-judicial malpractice panel hearing required); *Davis v. Omitowoju*, 883 F.2d 1155, 1158 (3rd Cir. 1989) (damages cap); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (damages cap); *DiAntonio v. Northampton-Accormack Mem. Hosp.*, 628 F.2d 287, 291 (4th Cir. 1980) (pre-suit notice of intent to sue required); *Lucas v. United States*, 807 F.2d 414, 424 (5th Cir. 1986) (damages cap); *Montagino v. Canale*, 792 F.2d 554, 557 (5th Cir. 1986) (three-year statute of repose from negligent act or omission applicable to minors and adults); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005) (damages cap); *Douglas v. Stallings*, 870 F.2d 1242, 1249 (7th Cir. 1989) (two-year statute of limitation from negligent act applicable to adults and all minors over age five); *Fitz v. Dolyak*, 712 F.2d 330, 333 (8th Cir. 1983) (six-year statute of repose from negligent act or omission unless foreign object); *Jewson v. Mayo Clinic*, 691 F.2d 405, 411 (8th Cir. 1982) (two-year statute of limitation from last treatment); *Hoffman v. United States*, 767 F.2d 1431, 1436-37 (9th Cir. 1985) (non-economic damages cap); *Brubaker v. Cavanaugh*, 741 F.2d 318, 322 (10th Cir. 1984) (four-year statute of repose from negligent act). *Reese v. Rankin Fite Mem. Hosp.* 403 So.2d 158 (Ala. 1981) (tolling abolished for minor over age four, minors under age five until eighth birthday); *Anderson v. Wagner*, 79 Ill.2d 295, 402 N.E.2d

560, 567-68 (1979) (two-year statute of limitation from injury and four-year statute of repose from act), *app. denied sub nom., Woodward v. Burnham City Hosp.*, 449 U.S. 807, 101 S. Ct. 54 (1980); *Rohrabaugh v. Wagoner*, 274 Ind. 661, 413 N.E.2d 891, 895 (1980) (no tolling for minors from age six); *Bonin v. Vannaman*, 261 Kan. 199, 929 P.2d 754, 768-69 (1996) (eight-year state of repose applied to minor in medical malpractice action); *Maine Medical Center v. Cote*, 577 A.2d 1173, 1178 (Me. 1990) (six year statute abolishing tolling for minors); *Harlfinger v. Martin*, 435 Mass. 38, 754 N.E.2d 63, 68, 74 (2001) (seven-year statute of repose for minors); *Bissell v. Kommareddi*, 202 Mich. App. 578, 509 N.W.2d 542, 543 (1993) (no tolling for minors); *Hohn v. Slate*, 48 N.C. App. 624, 269 S.E.2d 307, 308 (Ct. App. 1980) (less tolling for minors in medical malpractice than other tort actions); *Jones v. Salem Hospital*, 93 Or. App. 252, 762 P.2d 303, 309 (1988) (no tolling for minors); *Willis v. Mullett*, 263 Va. 653, 561 S.E.2d 705, 711 (2002) (no tolling for minors over seven, minors under eight have until tenth birthday); *Aicher v. Wisconsin Patients Compensation Fund*, 237 Wis. 2d 99, 613 N.W. 2d 849, 872-73 (2000) (no tolling but minors have until at least tenth birthday).

> States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

City of New Orleans v. Dukes, 427 U.S. 297, 303, 49 L.Ed. 2d 511, 96 S. Ct. 2513 (1976).

I. BECAUSE AGE IS NOT A SUSPECT CLASS, THE STATUTE NEEDS ONLY A RATIONAL BASIS.

This Court has repeatedly held in the context of mandatory retirement that classifications based upon age are constitutionally permissible and do not violate the guarantee of equal protection under the Fourteenth Amendment. *Gregory v. Ashcroft*, 501 U.S. 452, 470, 115 L.Ed.2d 410, 111 S. Ct. 2395 (1991) (state judges over age 70); *Vance v. Bradley*, 440 U.S. 93, 97, 59 L.Ed.2d 171, 99 S. Ct. 939 (1979) (foreign service members over age 60); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 49 L.Ed.2d 520, 96 S. Ct. 2562 (1976) (per curiam) (uniformed police officers over age 50). Unlike classifications based upon race and sex, classifications based upon age are so likely to be linked to a legitimate state interest as not to arise from "prejudice or antipathy." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442, 87 L.Ed.2d 313, 105 S. Ct. 3249 (1985). By contrast, suspect classes, based upon race and sex, have been subject to a history of harmful discrimination. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28, 36 L.Ed.2d 16, 93 S. Ct. 1278 (1973).

While this Court has not previously addressed the precise question whether minority alone creates a suspect class, the rationale that the members of the purported class are historically subject to harmful discrimination compels the conclusion that minors are not a suspect class. Minors have traditionally been treated differently than adults but only for their own protection. Though the

elements of history and discrimination are present, the harm is absent.

On facts very similar to this current case the Seventh Circuit Court of Appeals found minors not to constitute a suspect class and no violation of equal protection of the laws or due process of law under the Fourteenth Amendment. *Douglas v. Stallings*, 870 F.2d 1242, 1249 (7th Cir. 1989). In that case Indiana had enacted a medical malpractice statute similar to Georgia's and for the same reasons. In response to increasing medical malpractice premiums discouraging medical doctors from practicing in Indiana, in 1975 the legislature there enacted a two-year statute of limitations for medical malpractice actions to abolish the tolling until majority available in other personal injury and tort claims. An exception was made for minors under age six, who were given until their eighth birthday to file suit. In addition, the date from which the period of limitation ran was changed from date of the injury or of the discovery of the injury to the date of the allegedly negligent act or omission. In 1984, the plaintiff, who had suffered irreversible brain damage during his birth in 1968, sued the obstetrician for negligence in the prenatal and postnatal care.

On those facts the Seventh Circuit in *Douglas* found minors not to constitute a suspect class because they typically benefited from discrimination and upheld the legislation as a legitimate classification based upon youth.[12]

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[12] Any argument that claimants with a latent injury constituted a suspect class would fare no better. *Brubaker v. Cavanaugh*, 741 F.2d 318, 322 (10th Cir. 1984).

> It is because race and national origin are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. . . . For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." [cits. omitted] Legislative classification based on youth, however, is clearly relevant to the state's *parens patriae* responsibilities toward minors.

Id. at 1246.

In so holding the Seventh Circuit in *Douglas* also rejected the heightened or intermediate level of scrutiny typically applied to classifications based upon sex. 870 F.2d at 18. Petitioners' purported authority of this Court for the contrary conclusion consists only of precedent concerning illegitimate children, whose illegitimacy not minority had subjected them to a history of harmful discrimination.[13] *E.g., Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

The highest courts of Alabama, Indiana, Illinois, Kansas, Maine, Massachusetts, Michigan, Virginia, and Wisconsin have employed a similar analysis to the Seventh Circuit

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[13] Plaintiffs also rely upon *Plyler v. Doe*, 457 U.S. 202 (1982), finding a Texas statute barring illegal immigrants from free public education to deny equal protection, but this Court split 4-4 and affirmed the decision below. Without a majority concurring in the opinion, *Plyler* binds only the parties to that case and is not *stare decisis*.

in *Douglas* and found that youth is not a suspect or quasi-suspect class but a legitimate classification where the statutory objectives include reducing old malpractice claims. *Reese v. Rankin Fite Mem. Hosp., supra* at 161; *Anderson v. Wagner, supra* at 310, *app. denied sub nom., Woodward v. Burnham City Hosp., supra* at 807; *Rohrabaugh v. Wagoner, supra* at 665; *Bonin v. Vannaman, supra* at 216; *Maine Medical Center v. Cote, supra* at 1173; *Harlfinger v. Martin, supra* at 48; *Bissell v. Kommareddi, supra* at 581; *Willis v. Mullett, supra* at 661; *Aicher v. Wisconsin Patients Compensation Fund, supra* at 867. North Carolina and Oregon reached similar results under a slightly different analysis where the allegedly prohibited class consisted of all medical malpractice claimants. *Hohn v. Slate, supra* at 627; *Jones v. Salem Hospital, supra* at 259.

Because youth is neither a suspect nor a quasi-suspect class, state legislation affording different treatment to persons on account of their minority is not subject to either strict or heightened scrutiny under an equal protection analysis. Rather the legislative enactment must simply have a rational basis to further a legitimate objective of the state government. Preventing stale medical malpractice claims, lowering medical malpractice insurance costs and assuring an adequate supply of medical doctors are legitimate objectives under the state's police powers.[14]

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[14] "The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, preventing the curtailment

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II. A CIVIL ACTION IS NOT A FUNDAMENTAL RIGHT.

Fundamental rights, whose exercise the Fourteenth Amendment protects, are those rights which the Constitution of the United States explicitly or implicitly creates. *San Antonio Independent School Dist. v. Rodriguez, supra* at 36. On a case by case basis this Court has determined which rights are created under the Constitution. *E.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to privacy); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (voting rights); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) (freedom of association).

By contrast a civil lawsuit does not constitute a fundamental right. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S. Ct. 1137, 89 L.Ed. 1628 (1945) (no violation of equal protection where statute of limitations tolled). *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982) (same).

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). They are by definition arbitrary, and their operation does not

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of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice claims, and providing for the public safety, health, and welfare as a whole." O.C.G.A. § 9-3-73(f).

> discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase Securities Corp. v. Donaldson, *supra* at 314. Because a civil action is not a fundamental right, its abrogation by a statute of limitation or repose need only bear a rational relationship to the legitimate state objective.

All of the United States Circuit Courts of Appeal,[15] which have addressed this issue in the context of legislation reforming medical malpractice actions, have so held that the right to prosecute a civil action is not "fundamental" for purposes of equal protection analysis. *Gronne v. Abrams*, *supra* at 74; *Davis v. Omitowoju*, *supra* at 1158; *Boyd v. Bulala*, *supra* at 1196; *DiAntonio v. Northampton-Accormack Mem. Hosp.*, *supra* at 291; *Montagino v. Canale*, *supra* at 557; *Smith v. Botsford Gen. Hosp.*, *supra* at 520; *Douglas v. Stallings*, *supra* at 1249; *Fitz v. Dolyak*, *supra* at 332; *Hoffman v. United States*, *supra* at 1436.[16]

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[15] These decisions cover all circuits except the First, Eleventh, and District of Columbia.

[16] *Contra*, *Katz v. Children's Hospital*, 283 F.3d 1520, 1528 (9th Cir. 1994). The Ninth Circuit in this diversity case was predicting how California's highest appellate court would have ruled.

See Brubaker v. Cavanaugh, supra at 321. That the state might have chosen some means other than abolishing tolling for young minors until age seven or age ten and disallowing unknown claims after five years in an effort to rectify problems associated with medical malpractice insurance should not concern this Court under a rational basis analysis.

III. STATUTES OF LIMITATION, NEITHER TOLLING CLAIMS FOR MINORS NOR RUNNING FROM DISCOVERY, DO NOT VIOLATE DUE PROCESS.

Contrary to Petitioners' assertions, due process of law under the Fourteenth Amendment does not require tolling of the statute of limitations for minors or incompetent persons or until discovery of the claim. Rather "[d]ue process in the modification of procedural rules is provided by the legislature itself, subject to a minimal requirement of rationality." *Douglas v. Stallings, supra* at 1250. In seeking adjudication here Petitioners are really asking this Court to balance in their favor the competing interests involved in this suit, namely their alleged inability to bring the claim on or before November 10, 1994 (*i.e.*, Petitioner Derek Canas' seventh birthday) against Respondent's need not to face prosecution now for an alleged wrong committed on March 22, 1985 (*i.e.*, date HIV testing first available at MCG). Weighing these and other interests, like the affordability of malpractice insurance and the availability of medical doctors within a state, is better left to the state legislature.

Where no vested right to personal or real property is concerned, "a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a state of

limitations. . . ." *Chase Securities Corp. v. Donaldson*, *supra* at 311. In *Campbell v. Holt*, 115 U.S. 620, 29 L.Ed. 483, 6 S. Ct. 209 (1885) this Court upheld against a due process challenge a state statute abolishing the period of limitation and in effect depriving the defendant there of a viable defense to the claim. In *Wheeler v. Jackson*, 137 U.S. 245, 255, 34 L.Ed. 659, 11 S. Ct. 76 (1890), a statute shortening the time in which to bring an action to six months was approved as not violating the due process requirements of the Fourteenth Amendment.

> [T]he legislature . . . may shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all circumstances into consideration be given by the new law for the commencement of suit before the bar takes effect.

137 U.S. at 255. This deference by the federal courts to the state legislatures is premised upon the overwhelming state interest but minimal federal interest in tort law. "[T]he state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282, 62 L.Ed.2d 481, 100 S. Ct. 553 (1980) (sovereign immunity no violation of due process).

In Petitioner's case his cause of action arose on March 22, 1985, when he first could have been tested for and shown positive for HIV.[17] Under then existing law, allowing

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[17] If AIDS rather than HIV were considered the injury, the statute would have begun running when Petitioner Derek Canas reached age

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tolling during minority, Petitioner then had two years after his eighteenth birthday, or until November 10, 2004, to bring suit. O.C.G.A. § 9-3-90; former Code § 3-1102.[18] When tolling was abolished for minors over age five in medical malpractice actions, effective July 1, 1987, Petitioner who was then between two and three years old, had until his seventh birthday, or November 10, 1991, to file this action.[19] Since by his own expert's testimony Petitioner Derek Canas displayed obvious symptoms of AIDS by age one or two, providing him with at least another four years in which to bring an action was not unreasonable. Because the legislature provided a reasonable amount of time to prosecute the action, shortening the statute of limitation by abolishing tolling until the age of majority in medical malpractice actions is not "wholly arbitrary or irrational" and does not violate due process.

That Petitioners allegedly did not know that they had a claim before it actually expired does not make the statutes of limitation and repose irrational and so deny them due process of law under the Fourteenth Amendment. *Douglas v. Stallings*, *supra* at 1249. *Fitz v. Dolyak*, *supra* at 333; *Jewson v. Mayo Clinic*, *supra* at 412. *Clark v. Gulesian*, 429 F.2d 405 (1st Cir. 1970), *cert. denied*, 400

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one or age two on November 10, 1985, or 1986, but the analysis would be no different.

[18] If former Code § 3-1102 were not applied, the two-year general statute of limitations for personal injury at O.C.G.A. § 9-3-33 would apply, and the result would be the same.

[19] The statute also provided a two-year grace period until July 1, 1989, if the new provisions, taking effect on July 1, 1987, barred a claim permitted under the former law. § 9-3-73(g). The grace period is not relevant to this case because Petitioner's claim was not barred on July 1, 1987, by the new statute.

U.S. 993, 91 S. Ct. 461, 27 L.Ed.2d 441. Even if such a harsh result occurred under the facts of this particular case, this result is necessary to avoid old claims in many other situations.

IV. THE STATE LEGISLATURE LIMITED TOLLING FOR MINORS AND REFUSED TO ADOPT A DISCOVERY RULE AS A VALID EXERCISE OF ITS SOVEREIGNTY.

In three separate legislative sessions spanning two decades, the state legislature has modified the procedural rules respecting the limitation of medical malpractice actions in order to curtail lengthy exposure from claims, to lower insurance costs, and to maintain affordable medical care. A review of the legislative development of current medical malpractice statutes of limitation and repose at §§ 9-3-71 and 9-3-73 in the context of prevailing judicial authority demonstrates this consistent purpose. Until 1976 Georgia had no special statute of limitation, applicable only to medical malpractice actions, and medical malpractice claims, like all other personal injury claims, were governed by a two-year statute running from when the cause of action accrued. § 9-3-33, former Code § 3-1004. Since a cause of action accrues when the last essential element of the action first arises, the date of the injury commonly triggered the statute of limitation in medical malpractice actions.

In the late 1960's and early 1970's, Georgia courts expanded the rights of personal injury claimants by adopting both a continuing tort rule, *Parker v. Vaughan*, 124 Ga. App. 300, 183 S.E.2d 605 (1971) (foreign object), *Forgay v. Tucker*, 128 Ga. App. 497, 197 S.E.2d 492 (1973), *Piedmont Pharmacy v. Patmore*, 144 Ga. App. 160, 240

S.E.2d 888 (1977), and a discovery rule. *Everhart v. Rich's*, 229 Ga. 798, 194 S.E.2d 425 (1972). Amid concerns that medical malpractice claims arising years later would destabilize insurance, the General Assembly responded in 1976 to these judicial developments by enacting a special statute of limitation applicable only to medical malpractice actions and providing that the two-year period of limitation ran from the alleged occurrence, not the injury. Former Code § 3-1102. The 1976 legislation specifically incorporated the tolling provisions for minors until the age of majority. Former Code § 3-1104.

Following some initial unsuccessful constitutional challenges, *Hamby v. Neurological Assoc.*, 243 Ga. 698, 256 S.E.2d 378 (1979), the Supreme Court of Georgia eventually determined in 1983 and 1984 that running the statute of limitation from the date of the occurrence rather than from the date of the injury violated equal protection under certain circumstances. *Shessel v. Stroup*, 253 Ga. 56, 59, 316 S.E.2d 155, 158 (1984). *Clark v. Singer*, 250 Ga. 470, 472, 298 S.E.2d 484, 486 (1983). Again amid concerns about medical malpractice insurance, the state legislature responded in 1985 by amending the medical malpractice statute to include a five-year statute of repose from the date of the negligent act while reverting to the date of injury or death for triggering the statute of limitation. § 9-3-71. Still no change was made in the tolling provision for minors at former Code § 3-801. *See Quinn v. Stafford*, 257 Ga. 608, 610, 362 S.E.2d 49, 51 (1987).

Then in 1987 because of the remaining "long-tail" exposure caused by tolled claims from minors, the Georgia legislature enacted the current statute, which abolishes tolling for minors over age five and limits tolling for minors under age five to the seventh birthday for the

statute of limitation and the tenth birthday for the statute of repose. It was against this background that the Supreme Court of Georgia found no constitutional violation under the Fourteenth Amendment in *Crowe v. Humana*, 263 Ga. 833, 834, 439 S.E.2d 654, 655 (1994) (grace period approved) and in *Smith v. Cobb County-Kennestone Hosp. Auth.*, 262 Ga. 566, 570, 423 S.E.2d 235, 239 (1992).

> We have no difficulty concluding that the separate classification of minors for purposes of medical malpractice actions could accomplish the stated legislative objectives. Before the 1987 amendment of § 9-3-73, minors . . . whose cause of action accrued at birth . . . could wait up to 18 years before the medical malpractice statute of limitation began to run. It appears from subsection (f) of § 9-3-73 that the General Assembly may have perceived the onset of a crisis in this state's health care industry, and that a method of meeting the crisis was to reduce minors' period of disability from eighteen to five years, thereby limiting the period within which minors could bring medical malpractice claims. The reduction of the period within which minors could bring suit certainly would tend to achieve the stated legislative objectives, as, *e.g.*, it would tend to prevent stale medical malpractice claims, and would also tend to lower insurance and medical costs by decreasing the period in which health care providers and their insurers would be exposed to suit.

262 Ga. at 570-71. Petitioners are asking this Court to ignore the history of this legislation and to substitute their judgment for the legislature's.

V. THERE IS NO MEANINGFUL LACK OF UNIFORMITY AMONG STATE APPELLATE AND FEDERAL CIRCUIT COURTS.

The decisions of the highest state courts on the federal question whether abolishing tolling for minors until the age of majority in only medical malpractice but not other tort actions violates equal protection or due process of law under the Fourteenth Amendment are uniform. Other than Georgia, all states addressing this question (*i.e.*, Illinois, Kansas, Maine, Massachusetts, Michigan, and Oregon[20]) have found no violation of the Fourteenth Amendment. Petitioners are correct that the appellate courts of two states[21] (*i.e.*, New Mexico and South Dakota[22]) have found that the two-tier medical malpractice statutes of repose or limitation deprive older minors of equal protection or due process under the Fourteenth Amendment to the United States Constitution although five (*i.e.*, Alabama, Georgia, Indiana,[23] Virginia, and Wisconsin[24])

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[20] *Anderson v. Wagner*, 79 Ill.2d 295, 402 N.E.2d 560, 567-68 (1979). *Bonin v. Vannaman*, 261 Kan. 199, 929 P.2d 754, 768-69 (1996). *Maine Medical Center v. Cote*, 577 A.2d 1173, 1178 (Me. 1990). *Harlfinger v. Martin*, 435 Mass. 38, 754 N.E.2d 63, 68, 74 (2001). *Bissell v. Kommareddi*, 202 Mich. App. 578, 509 N.W.2d 542, 543 (1993). *Jones v. Salem Hospital*, 93 Or. App. 252, 762 P.2d 303, 309 (1988).

[21] *Katz v. Children's Hospital* is excluded for reasons stated in footnote 15.

[22] *Jamarillo v. Heaton*, 136 N.M. 498, 100 P.3d 204 (Court Appeals 2004); *Lyons v. Lederle Laboratories*, 440 N.W.2d 769 (S.D. 1989).

[23] A seemingly contrary decision in *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999) rests upon the Indiana Constitution.

[24] *Reese v. Rankin Fite Mem. Hosp.* 403 So.2d 158 (Ala. 1981); *Crowe v. Humana Hospital*, 263 Ga. 833, 439 S.E.2d 654 (1994); *Rohrabaugh v. Wagoner*, 274 Ind. 661, 413 N.E.2d 891, 895 (1980); *Willis v. Mullett*, 263 Va. 653, 561 S.E.2d 705, 711 (2002); *Aicher v.*

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have not. Still the rulings on the federal Constitution in the New Mexico and South Dakota cases were unnecessary, since the appellate courts also found the statute in question to violate its own state constitution. Rather the lack of uniformity, alleged by Petitioners, arises primarily out of these appellate courts' consideration of differing statutes under varying constructions of the constitutions of the individual states.[25]

Wisconsin Patients Compensation Fund, 237 Wis. 2d 99, 613 N.W.2d 849, 872-73 (2000).

[25] Following in alphabetic order by state are decisions from Arizona, Colorado, Missouri, New Hampshire, Ohio, Texas, and Utah finding a medical malpractice statute of limitation or repose to violate equal protection, due process, of some other provision under its own *state* constitution. "We . . . hold that the statute violates . . . the Arizona Constitution. . . . [F]ederal authority is cited only for the purpose of guidance and not because it compels the result which we reach. . . ." *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961, 963 (1984) (three-year statute of repose applied to adult plaintiff). "We . . . hold that the medical malpractice statute violates the equal protection provisions of our [state] constitution. . . ." *Austin v. Litvak*, 682 P.2d 41, 52 (1984) (three-year general statute of repose, applicable to adult plaintiff, allowed longer period where foreign object left in body). "The statutory limitation period, as applied to minors, violates their right of access to our courts under [Missouri] Const. . . ." *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7, 15 (Mo. 1986) (four-year statute of repose applied to minors from age ten). "In interpreting our State Constitution, we are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires." *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 831 (1980) (two-year statute of limitation allowed longer period only where foreign object left in body; minor less than eight required to bring action by tenth birthday.) "[W]e hold that [the statute] is unconstitutional because it violates the right of medical malpractice litigants who are minors to 'equal protection.' Section 2, Article I of the Ohio Constitution." *Schwan v. Riverside Methodist Hospital*, 6 Ohio St.3d 300, 452 N.E.2d 1337, 1338 (1983) (four-year statute of repose allowed minors under age ten to file suit up to fourteenth birthday). "The single issue raised . . . is whether [the statute], as applied to minors, violates the due process or due course of

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CONCLUSION

The decisions of state and federal appellate courts do not genuinely reflect lack of uniformity on the questions presented. Rather they show that similar and sometimes almost identical statutes, enacted for the purpose of addressing problems associated with medical malpractice insurance, have consistently met the requirements of equal protection and due process under the Fourteenth Amendment. Petitioners dispute how the state legislature chose to balance the competing interests in medical malpractice actions and argue passionately, as did some legislators in Georgia, that the insurers concocted a crisis in order to change the law. The Petition for Certiorari asks this Court to act as a super-legislature, but the function of this Court under these circumstances is to determine whether the legislation meets the requirements of equal protection and due process under the Fourteenth Amendment. This Court has never previously considered youth a suspect class or prosecution of a civil lawsuit a fundamental right for purposes of equal protection. This Court has consistently allowed sovereign states to shorten or repeal statutes of limitation without violating due process and has never demanded anything close to a seven-year grace period. Petitioners, who were bringing their medical malpractice action under state law, were required to file

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law provisions of the Ohio Constitution. . . ." *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 503 N.E.2d 717, 719 (1986) (same). "What remains for our determination is whether article 5.82, section 4, is violative of . . . the Texas Constitution." *Sax v. Votteler*, 26 Tex. Sup. J. 316, 648 S.W.2d 661, 664 (1983) (two-year statute of limitation applied to minors from age six). "[W]e hold [the statute] unconstitutional under . . . the Utah Constitution." *Lee v. Gaufin*, 227 Utah Adv. Rep. 3, 867 P.2d 572, 589 (1993) (two-year period of limitation from discovery of the injury and four-year period of repose after the negligent act applied to minors).

the claim within about seven years but failed to do so and are in the best position to bear the consequences of their failure. Therefore, Respondent asks this Court to deny the Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

U. S. Const. Amend. XIV, Sec. 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USCS § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Georgia Const. Art. VI, § V, Para. III

The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other

courts by law. The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents.

O.C.G.A. § 9-3-33, former Code § 3-1004. General statute of limitation for personal injuries

Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues.

O.C.G.A. § 9-3-71. Medical malpractice statute of limitation and repose

(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

(c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.

(d) Nothing contained in subsection (a) or (b) of this Code section shall be construed to repeal *Code Section 9-3-73*,

which shall be deemed to apply either to the applicable statutes of limitation or repose.

O.C.G.A. § 9-3-72. Special statute for foreign objects

The limitations of *Code Section 9-3-71* shall not apply where a foreign object has been left in a patient's body, but in such a case an action shall be brought within one year after the negligent or wrongful act or omission is discovered. For the purposes of this Code section, the term "foreign object" shall not include a chemical compound, fixation device, or prosthetic aid or device.

O.C.G.A. § 9-3-73. Special statute for minors

(a) Except as provided in this Code section, the disabilities and exceptions prescribed in Article 5 of this chapter in limiting actions on contracts shall be allowed and held applicable to actions, whether in tort or contract, for medical malpractice.

(b) Notwithstanding Article 5 of this chapter, all persons who are legally incompetent because of mental retardation or mental illness and all minors who have attained the age of five years shall be subject to the periods of limitation for actions for medical malpractice provided in this article. A minor who has not attained the age of five years shall have two years from the date of such minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years.

(c) Notwithstanding subsections (a) and (b) of this Code section, in no event may an action for medical malpractice be brought by or on behalf of:

(1) A person who is legally incompetent because of mental retardation or mental illness more than five years after the date on which the negligent or wrongful act or omission occurred; or

(2) A minor:

(A) After the tenth birthday of the minor if such minor was under the age of five years on the date on which the negligent or wrongful act or omission occurred; or

(B) After five years from the date on which the negligent or wrongful act or omission occurred if such minor was age five or older on the date of such act or omission.

(d) Subsection (b) of this Code section is intended to create a statute of limitations and subsection (c) of this Code section is intended to create a statute of repose.

(e) The limitations of subsections (b) and (c) of this Code section shall not apply where a foreign object has been left in a patient's body. Such cases shall be governed by *Code Section 9-3-72*.

(f) The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, preventing the curtailment of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice

claims, and providing for the public safety, health, and welfare as a whole.

(g) No action which, prior to July 1, 1987, has been barred by provisions relating to limitations of actions shall be revived by this article, as amended. No action which would be barred before July 1, 1987, by the provisions of this article, as amended, but which would not be so barred by the provisions of this article and Article 5 of this chapter in force immediately prior to July 1, 1987, shall be barred until July 1, 1989.

O.C.G.A. § 9-3-90, former Code § 3-801. Tolling for minors

(a) Minors and persons who are legally incompetent because of mental retardation or mental illness, who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons.

Former Code § 3-1102. Medical malpractice statute of limitation (repealed)

Except as otherwise provided in this Chapter, an action for medical malpractice shall be brought within two years after the date on which the negligent or wrongful act or omission occurred.

Former Code § 3-1103. Special statute for foreign objects (repealed)

None of the limitations of section 3-1102 shall apply where a foreign object has been left in a patient's body, but an

action shall then be brought within one year after such negligent or wrongful act or omission is discovered. For purposes of this section, "foreign object" shall not include a chemical compound, fixation device or prosthetic aid or device.

Former Code § 3-1104. Tolling for minors in medical malpractice (repealed)

The disabilities and exceptions prescribed in Chapter 3-8 in limiting actions on contracts shall be allowed and held applicable to action, whether in tort or contract, for medical malpractice.